STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7440

Petition of Entergy Nuclear Vermont Yankee)
LLC and Entergy Nuclear Operations, Inc., For)
Amendment of their Certificates of Public Good)
and other approvals under 10 V.S.A. §§ 6501-6504)
and 30 V.S.A. §§ 231(a), 248 & 254, for authority)
to continue after March 21, 2012, operation of the)
Vermont Yankee Nuclear Power Station, including)
storage of spent nuclear fuel)

REPLY BRIEF SUBMITTED ON BEHALF OF VPIRG

Introduction

VPIRG submits this Brief in reply to the submissions on July 17, 2009 of ENVY, the DPS and the utilities, to address the following issues.

3 *Decommissioning* ENVYôs Brief asserts that the costs of decommissioning are not included in the rates contained within the existing PPA, and draws a line in the sand about the future ï ENVY would rather close the facility than try to sell power based on rates that include the cost of decommissioning. ENVYôs position means that future generations of ratepayers will have to pay for this generationôs decommissioning costs (or that the facility will have to be ñentombedò or placed in ñSAFESTORò for years). ENVYôs position also excuses it from the decommissioning ï guarantee requirements imposed on its competitors who are attempting to develop renewable energy and sell it at competitive rates.

3 *Alternatives* ENVY wrongly dismisses renewable alternatives on the basis of the assumption that only renewable sources located within Vermont should be considered.

3 *Economic Benefit* Economic benefit has been proven only on the untenable

assumption that if VY closes, no alternatives will take its place.

3 *State Jurisdiction* Standards urged by the DPS, WRC and others as essential to protecting Vermonters in fact are unlikely to be enforceable against ENVY.

3 *Spent Fuel Pool*. ENVY argues that the Board has no business considering the hundreds of billions of dollars in economic costs that potentially would be suffered by Vermonters were the spent fuel pool to suffer a partial or complete loss of coolant. While asking the Board to accept the off-the-record assurances of NRC Staff about potential VY financial problems, ENVY simultaneously asks the Board to ignore the findings of a blue-ribbon panel of the National Research Council of the National Academies of Science about spent fuel pool risks.

3 *A Preliminary Order* The preliminary order sought by the utilities and the DPS would be an unlawful advisory opinion.

1. ENVY Submissions

a. ENVY's "business case" approach to decommissioning is unfair and unlawful

ENVYøs Brief leaves no doubt what its position is as to decommissioning, and who should pay for it. Page 2 of its 109- page brief states that if decommissioning is to happen in 2032, as the DPS witness Lamont and other witnesses testified is required to meet the standards of § 248(b)(1) (see, e.g., Dodson PFT 3/3/09 at 40, 5/26/09 Tr. at 35-36 [Buchanan], 6/3/09 tr at 41-42 [Lamont]) and as the DPS demands in its post-hearing filing (pp.34-38), then money will have to be set aside now to pay for it, and this may not ñleave a business case to operate the VY station.ò ENVYøs position, also on page 2 and reiterated on page 41, is that the existing PPA contributes value to ratepayers only because ENVY chose ñnot to contribute to the Decommissioning Fund.ò If the costs of decommissioning were being included in rates, there would have been no PPA.

In other words, the ñbusiness caseò for operating VY has been and will continue to be dependent upon leaving decommissioning costs to future generations of ratepayers. This is unfair to future ratepayers and is unlawful, as addressed in VPIRGôs 7/16/09 Memorandum of Law, pp. 41-42). See, *e.g.*,In re C.V.P.S, Docket Nos. 6946 & 6988 Order dated 3/29/05, 241 P.U.R. 4th1, where the Board stated that ñIntergenerational equity is of great concern to usò and that the allocation of costs should ñmatchò the allocation of benefits. On this basis, the Board authorized CVPS, over DPS objection, to collect asset salvage costs from current ratepayers.[1] This Board has required that a letter of credit or other guarantee of complete decommissioning costs be provided prior to operation of other recent projects regulated under § 248, thus ensuring that the developer address these costs at the onset of operation. In re: Amended Petition of Deerfield Wind, LLC, Docket No. 7250, Order of 4/16/09 at 92; In re: Amended Petition of UPC Wind, LLC, Docket No. 7156, Order of 8/8/2007 at 109, 116; In re: Petition of EMDC, d/b/a/ East Haven Wind Farm, Docket No. 6911, Order of 7/17/2006 at 82.

Page 3 of the ENVY Brief states that if the Board were to compel VY to start collecting in rates, now, to pay for decommissioning in 2032, ñVermonters have a lot to loseò because ENVY would shutter the plant. In other words, ENVYôs position is that it is too big, too important, to be held to the standards that apply to others.

ENVYôs position also cannot be reconciled with 30 V.S.A. § 2(d), which states (emphasis added):

> (d) In any proceeding where the decommissioning fund for the Vermont Yankee nuclear facility is involved, the department shall represent the consuming public

[1] ñCVPS has convinced us that to adopt the DPS's recommendation regarding a net salvage allowance would create inequities by requiring ratepayers at the time an asset is retired to pay all the net salvage costs (or allow ratepayers at the time an asset is retired to receive the benefit if the net salvage costs are negative). Instead, net salvage costs should be recovered from ratepayers over an asset's expected lifetime. This concept of spreading cost recovery over time to match the costs with the benefits is similar to the purpose behind depreciation.ò

> in a manner that acknowledges that the general public interest requires that the consuming public, rather than either the state's future consumers who never obtain benefits from the facility or the state's taxpayers, ought to provide for all costs of decommissioning. The department shall seek to have the decommissioning fund be based on all reasonably expected costs.

Regardless of whether the Board reaches a decision in this case that that the facility must be decommissioned immediately upon ceasing generation (which VPIRG submits it should), this is a reasonably foreseeable scenario. The DPS has forcefully advocated that this occur. ENVY has now made clear that it will not be collecting in rates the funds it would need to address this reasonably foreseeable scenario. This means that immediate decommissioning in 2032 (or whenever VY ceases generating power) either cannot happen or that an unfair share of the burden of paying for it will fall upon future generations of ratepayers, contrary to Vermont precedent and § 2(d). By approving the Petition, on this record, the Board will be committing Vermont and the NRC to an eventual choice between one of these two unacceptable outcomes. Instead, if the Board imposes the same type of condition that it imposed in the Deerfield, UPC Wind and EMDC cases, the public can rest assured that regardless of when VY ceases generating power, there will be sufficient funds to immediately commence decommissioning.

VPIRG respectfully submits that ENVY should be held to the same standards of other generators of electricity. It must demonstrate that it has the resources to decommission upon cessation of power generation, and it must not defer that cost to future generations of ratepayers. ENVY has stated that if compelled to conform to these standards it may close the facility. The Boardôs response should not be to retreat from the policies it and the General Assembly have already clearly and rightfully articulated.

b. ENVY's discussion of alternatives is flawed logically and legally

ENVYôs Brief (p.12) dismisses renewable alternatives largely on the basis of witness

Albertôs testimony that ñthe best wind regimes in Vermont occur on ridgelines and these locations also have the greatest effect on the viewshedò and thus are unlikely to be permitted in time to replace VY. But Mr. Albert agreed that he considered only the potential for windpower that would be sited in Vermont. He agreed that since Vermont utilities purchase power on the regional grid, there is no reason to restrict the potential for windpower to Vermont sites. He testified that the potential for windpower within the region is thousands of megawatts, not the hundreds he studied in Vermont. Albert 5/27/09 Tr. pp.30, 98-101.

VY would not have been constructed if it were to operate solely on uranium mined in Vermont, or if all of its output could only be sold in Vermont. It makes no sense to rule out renewable alternatives to VY unless they use only Vermont ridgelines.

It is the state policy of Vermont to ñProvid[e] an incentive for the state's retail electricity providers to enter into affordable, long-term, stably priced renewable energy contracts that mitigate market price fluctuation for Vermonters [and to] Developé viable markets for renewable energy and energy efficiency projects.ò 30 V.S.A. § 8001. A ñviable marketò for renewable power cannot exist if the only acceptable source of windpower is Vermont ridgelines. The general good of Vermont must be weighed in this light. ENVY carries the burden of proof as to the general good of the state and as to economic benefit. ENVYôs Brief and the record fail to demonstrate that renewable sources of energy will not provide acceptable replacement for VY power.

c. <u>Mr. Heaps' economic benefit argument deserves no credit</u>

ENVY submits that the testimony of Mr. Heaps is sufficient proof of economic benefit to justify granting the Petition. Mr. Heaps testified about the 600 local jobs VY provides, and the resulting secondary employment and tax benefits for the Vermont economy. ENVY concludes

that it ñis not aware of any other Board Section 248 case in which the Board has considered a project with economic benefitsò this high. ENVY Brief p. 16.

Mr. Heaps did not consider the job and tax benefits of generating energy from alternative sources. He compared the job and tax benefits of continued operation against those of zero replacement. He also did not consider the employment or tax impacts of substitute development at the same site, after decommissioning. 5/19/09 Tr. pp.155-159, 176. In answer to questions from members of the Board, Mr. Heaps stated that he also did not consider what the effect on Vermontôs economy would be if a new PPA differs from the existing one. He just assumed another stable low- priced contract when he reached his conclusions about positive impacts on the Vermont economy. 5/19/09 Tr. 167-174. Mr. Heapsôanalysis is of no use to the Board.

d. <u>ENVY's constitutional attack on § 248 is meritless</u>

ENVYôs Brief pp. 23-26 argues that if § 248 is interpreted to require a PPA, the statute would be unconstitutional because it lacks standards. The cases cited are inapposite, and the argument is frivolous. In each case in which the Board has required a PPA it has made findings and conclusions as to the costs and benefits of the proposal, and it has considered the existence and terms of a PPA as part of that weighing. In some cases, without a beneficially priced PPA a projectôs potential costs to the public outweigh its potential benefits. In this case, the DPSô witnesses reached this conclusion. ENVY does not explain how considering the potential economic benefit of a PPA could be unconstitutional, nor does it cite any cases remotely resembling or addressing this situation. It relies on cases in which zoning boards are given no standards to apply in granting or denying a zoning application.

ENVYôs Brief also ignores a tenet of due process law. The law on unconstitutionality for lack of standards requires a court or the Board to examine whether, *based on past applications of*

the statute in other cases, the courts or the agency have fleshed out the criteria and provided sufficient standards to rely on. Grayned v. City of Rockford, 408 U.S. 104, 111, 92 S.Ct. 2294, 2300, 33 L.Ed.2d 222, 229 (1972). The Board has issued multiple precedents that provide detailed guidance to ENVY on how the Board may rely on a PPA to find that a Petitioner has met its burden of proof. ENVY cites these cases in its brief. Clearly, ENVY is on notice of the manner in which a PPA may help it meet its burden of proof. The argument is frivolous.

ENVYôs Brief argues that reliance on a PPA means the Board will be applying § 248(a) without reference to the criteria in § 248(b). This part of the argument also is without merit. Prior Board decisions do consider PPAôs with reference to § 248(b)(4). See, e.g., Deerfield Wind, supra, at Findings 87-91, addressing the need for a PPA under § 248(b)(4).

e. ENVY Refuses to Accept State Jurisdiction

Page 41 introduces ENVYôs objections to assertion of state jurisdiction over NRC-regulated decisions. ENVY writes that because of the NRCôs ñexclusive jurisdiction,ò numerous conditions proposed by the DPS and the Windham Regional Commission suffer from ñlegal infirmity.ò ENVY includes within this list:

ð the DPS 10 millirem and 4 millirem standards (p.47),

ðthe WRC condition on removal of all foundations (p.49),

ðthe DPS/WRC condition requiring immediate decommissioning upon cessation of power production (p.50)[2],

ðthe WRCôs condition that ENVY specify now the details of the future ISFSI and obtain PSB approval as part of this Petition (pp. 58-59),

ðthe DPS condition imposing full-core offload capability (pp.59-61),

[2] VPIRG agrees that the public interest and compliance with subsection 248(b)(1) require imposition of this condition. However, VPIRG is concerned that the Board may not be able to enforce this condition, for the reasons set forth in its initial brief.

ðthe DPS witnessôcondition on reduction of number and density of spent fuel assemblies (p.61),

ðthe DPS condition that decommissioning cost estimates be submitted every two and a half years (pp.74-79).

ENVY also states that the Vermont Department of Health 20 mrem standard is ñpreempted by the NRCôs exclusive jurisdiction,ò but ENVY will not contest this standard. ENVY Brief pp.99-100.

ENVYôs brief does not raise preemption arguments as to: decommissioning to ñGreenfieldò standards (Vanags PFT 2/11/09 p.9), a prohibition against rubblization (Vanags PFT 2/11/09 p.9-14), expeditious removal of spent fuel (Vanags PFT 2/11/09 p.15), and the 55/45 split of excess decommissioning funds upon certification that decommissioning is complete (Vanags PFT 2/11/09 p.16).

It would be imprudent to act on the Petition on the basis that any or all of these proposed standards may be made conditions to a CPG, acceptance of which will render the conditions binding on ENVY and its successors. For the reasons stated in VPIRGôs 7/16/09 Memorandum of law, pp.23-32.the Board should decide this case on the assumption that each one will be unenforceable.

f. <u>VPIRG's Exhibits and Proposed Subjects of Notice</u>

ENVY argues that ñtestimony or exhibits offered in another proceeding are not properly the subject of judicial noticeò and therefore should not be relied on by the Board. ENVY Brief pp.101-102. ENVY itself, however, has asked the Board to do just that. On pages 83-87 of its brief, ENVY quotes and asks the Board to accept facts about nuclear operator bankruptcy that are set forth in testimony given in certain NRC proceedings. ENVYôs Brief at page 83 reads:

ñIn 1999, the then NRC Deputy General Counsel, now NRC General Counsel, explained the NRCôs approach to bankruptcy as followsé ò The then Deputy General Counsel is then quoted, and the quote has footnote number 367 attached to it. Footnote 367 cites to a transcript page from an NRC proceeding. ENVY then paraphrases additional testimony or exhibits from NRCôs General Counsel on pages 85 and 87, and cites to the record of those other proceedings in footnotes 371 and 378. ENVY chose not to cite or submit these transcripts and exhibits before the evidence closed. ENVY also chose not to submit copies to all the parties and the Board along with its brief.

In contrast, VPIRG submitted both the NAS report and the Beyea report to every party and formally asked for judicial notice and administrative notice of each document, while the evidence in the case was open and regular hearings were being held. The NAS Report is not testimony or an exhibit from another case. It is a published report by the National Research Council, made to Congress at the request of Congress.

VPIRGôs position is that the Boardôs expertise in these areas, and the importance of these proceedings to the public, justify resort by the Board to a wide range of technical and legal background materials. If the Board finds that it has the expertise to evaluate how reliable the materials cited and quoted by ENVY are, and if the Board finds these materials may be useful in rendering a decision, then the Board should take judicial or administrative notice of them and rely on them to the extent the Board find them to be reliable and useful[3]. The same approach should be used with regard to VPIRGôs submissions. VPIRGôs Brief addresses these issues in detail at pages 6-23.

[3] At the request of VPIRGôs counsel made on July 30, 2009, on July 31, 2009 ENVY circulated an electronic version of the cited materials. Any other party who wishes to object to these materials now may do so.

ENVY also objects that judicial or administrative notice violates its right of cross-examination under 3 V.S.A. § 810. ENVY Brief pp. 103-104. ENVYõs dispute is with the concepts of judicial notice and administrative notice, which usually involve admission into evidence of documents the authors or which are not available for cross-examination. For example, trial and appellate courts take judicial notice of other court records without any opportunity for cross-examination or authentication or even rebuttal. McCormick on Evidence (3rd ed. 1984) § 333. See, e.g., McCarthy v. Warden, Connecticut State Prison 213 Conn. 289, 567 A.2d 1187, 1189 (Conn. Supreme Ct 1989) (taking judicial notice of records of another court on its own motion, without any sponsoring witness or authentication). Administrative notice lies even more within the agencyõs discretion. As McCormick explains, ñThe primary thrust behind official notice is to simplify or ease the process of proof.ò The treatise explains further:

> At times, even the obvious could be difficult or time-consuming to prove, without affecting the final resulté Moreover, administrative agencies were often created to become repositories of knowledge and experience. It would defeat their existence to require adherence to traditional methods of proof when alternative and equally fair methods are readily available.

McCormick, supra, § 359. So long as the parties receive notice of what is being noticed, and are given the opportunity to refute or explain what has been noticed, due process is satisfied. Ibid.

The statute upon which ENVY relies does not support ENVYõs position that the right of cross-examination supersedes all other procedures. Subsection 810(3) states that a ñparty may conduct cross-examination required for a full and true disclosure of the facts.ò But subsection (1) of the same statute states ñWhen necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.ò Subsection (4) of the same statute states::

> (4) Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.

VPIRG recognizes that decisions as to judicial notice and administrative notice are entrusted to the Boardôs discretion. VPIRG asks the Board to use that discretion wisely and to conclude that without site-specific analysis of the likelihood and economic consequences of a loss-of-coolant event at Vermont Yankee, the Petition cannot be granted.

2. DPS Submissions

a. The DPS economic benefit argument deserves no credit

The DPS asserts that the continued operation will provide an economic benefit, based on jobs, tax revenues and the possibility of a PPA. DPS Findings 104-124, Discussion pp.51- 56. Like Mr. Heaps, the DPSôeconomic benefit witnesses did not compare the job and tax benefits of continued operation with the job and tax benefits of generation from alternative sources. Nagle PFT 2/11/09 p.11 (employment by replacement sources not considered); 5/27/09 Tr. pp. 120-122 (DPS witness Thomas assumed all laid off VY employees remained jobless). By assuming either that there will be no replacement energy or that all replacement energy will come from out of state[4], the DPSôanalysis was preordained to find economic benefit from continued operation. This analysis provides insufficient foundation for a Board finding on economic benefit from continued operation.

b. A Preliminary Decision Would Be Improper

The Department, GMP and CVPS ask for a preliminary or interim ruling (CVPS Brief

[4] As noted above, DPS witness Albertôs analysis of renewable alternatives to VY assumed that all replacement energy would come from within the state.

pp.1-4, GMP Brief pp. 1-4 , DPS Brief pp. 71-72). This is, frankly, bizarre. Interim and pretrial orders are reserved for the early stages of a proceeding, to guide the admission of evidence. See Board Rule 2.212. The evidence in this case is closed. There are no pending motions to reopen. There is one task left to the Board ï to issue its decision on the merits. 3 V.S.A. § 812.

The Board has consistently held that it will not issue advisory opinions. See.e.g, In re VELCO (Grice), Docket 7121, Order dated 12/5/06, text accompanying fns. 230-231.); In re Vermont Electric Coop, Docket 6950, Order dated 5/12/06. The requested opinion would be just that. In In re Williams, 154 Vt. 518, 577 A.2d 686 (1990), the Supreme Court held that the statutory procedure for District Court review of police discipline was unconstitutional because it authorized an advisory opinion. The opinion was advisory because the District Courtôs opinion was subject to later rejection or acceptance by a legislative body, the town selectboard. The courtôs rulings under the statute may not decide anything. Williams is indistinguishable.

The example cited by the Department and GMP, involving the sale to AmerGen, was a rare exception, perhaps the exception that proves the rule. In that case, the Board actually refused to release its decision. Instead, it released only the conclusions, in order to provide guidance for the follow-up case that was about to commence, similar to if not exactly a pretrial order under Board Rule 2.212. In that case, the Boardôs guidance was not subject to later acceptance or rejection by the legislature. The legislature had no role. A contested case, strictly within the Boardôs jurisdiction, was commencing.

GMPôs Brief argues In re Williams can be distinguished in that no final judgment is sought, just an interim order. Nothing in Williams or the Boardôs precedents supports this distinction. In ruling on NECNPôs Motion to Dismiss in Docket 6545 (Order issued 12/14/01) 2001 WL 1727285, the Board ruled that it did have authority to address whether Entergy was an

Exempt Wholesale Generator precisely because its ruling would not be subject to acceptance or rejection by another body: ñUnlike the circumstances described in *Williams*, the Board's consideration of Vermont Yankee's potential status as an EWG is not a situation where the Board's findings would have no effect unless subsequently approved by another body.ò That is not true here. Whether ñinterimò or ñfinal,ò the requested order will not have no legal effect unless the General Assembly approves the sale.

GMP also argues that the Board is not confined by the constitutional prohibition against advisory opinions. In part, GMPôs argument is supported by the Boardôs discussion in the Docket 6545 Order dated 12/14/01. The Board there listed its duly authorized duties that lie outside of deciding contested cases. But the Board did not find that issuing an advisory opinion within a contested case would be within the powers entrusted to it by statute. It rejected that approach and found that the EWG determination was proper because it was a necessary component of its decision in a contested case:

> The Board engages in numerous activities other than contested cases which fall within our express and implied powers. For example, as a state commission, the Board frequently provides comments to the FERC and the Federal Communications Commission (óFCCô). Thus, we find NECNP's arguments on this point unpersuasive. Advisory opinion limitations may exist to the extent that the Board is dealing with contested case issues. Because the EWG findings are an inherent element of our determination to issue a CPG under state law, the decision is not advisory and there is no violation of the Vermont APA, the Vermont Constitution or the U.S. Constitution.

(Emphasis added.) GMP thus invites the Board to do something it has never before done ï issue the kind of ruling that is proper only in a non-contested cases as an interim order within a contested case.

The authority to issue advisory opinions in the context of a contested case is neither expressly established by statute nor necessarily implied. Therefore it is outside the Boardôs

authority. Trybulski v. v. Bellows Falls Hydro-Electric Corp., 112 Vt. 1, 20 A.2d 117 (1941).

GMP fails to recognize that its position would spawn insurmountable statutory, ethical and constitutional problems. These include whether the Boardôs issuance of a non-contested case advisory ruling within a contested case is appealable under 3 V.S.A. § 815(a) (second sentence) , whether the issuance of such a non-contested case advisory opinion would entitle GMP, CVPS or any other party to rely on the advisory opinion for ñguidanceò as they explicitly ask to do (see, e.g., GMP Brief pp.2, 4), whether an unappealable advisory ruling that is issued so that the utilities can rely upon it would violate procedural due process by depriving other parties of the right to appeal a decision of the Board that is actually affecting their rights, and whether this manner of proceeding would violate the intent and wording of the Administrative Procedure Act that all decisions be on the record and backed up by findings (3 V.S.A. § 812) and that no Agency member communicate about the facts of the pending case to any person outside the agency -- including of course the legislature (3 V.S.A. § 813).

VPIRGôs position is that issuance of the requested advisory opinion would violate its due process rights and its rights under the Administrative Procedure Act, sections 809, 810, 812 and 813. This contested case was commenced by a Petition that did not provide any reason to believe that an advisory opinion for the legislature or for the ñguidanceò of the parties was being sought. What was being sought was contested case approval under § 248. Once the parties to the contested case concluded submitting their evidence and conducting their examinations under sections 809 and 810, pursuant to the notice provided by the Petition, the evidence was closed. From that point forward, under sections 812 and 813, the only way for the Board to communicate its thinking about the closed record is by issuing a final order.

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The Vermont Public Interest Research Group
By:
James A. Dumont
James A. Dumont, Esq.
Law Office of James A. Dumont, Esq. PC
15 Main St., PO Box 229
Bristol VT 05443
jim@dumontlawvt.com